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Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA and
COEUR D'ALENE TRIBE,

Respondents.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARKANSAS, NORTH DAKOTA, OREGON, SOUTH DAKOTA, UTAH, VERMONT, WASHINGTON AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI STATES

Throughout the country, navigable rivers and lakes provide highways of commerce, habitat for fisheries and irreplaceable sources of recreation and pleasure. To paraphrase Justice Holmes, they are more than amenities; they are treasures. But unlike ancient Rome and monarchical England, the trust in which they are held is not exercised by a crowned sovereign. After the Revolution, King George's jus publicum interest in the navigable waters of America passed to the people; inalienable resources entrusted to the sovereign States. The title to these waters, their beds and banks passes to the States under the Constitution. The States' ownership of these waters is an essential attribute of their sovereignty. *Utah Division Of State Lands v. United States*, 482 U.S. 193, 195 (1987). Suggestions that the States' sovereign interests in these waters were foreclosed by the actions of federal agencies taken before statehood must be received cautiously, and subjected to the most rigorous review.

SUMMARY OF ARGUMENT

Our lakes and rivers do not recognize political boundaries. Just as they run through counties and sometimes over state lines, they may run through federal reservations. There is nothing inherently inconsistent or unacceptable about a State sovereign river running through a federal reservation, or a State sovereign lake existing within one. The history of public land law is largely one that deals with the coexistence of two sovereigns within one state. Such coexistence can be messy,

and at times conducive to fraternal strife. No doubt it might be neater to have a central government based on the continental system, in which States act as departments run from Washington. Cf. *New York v. United States*, 505 U.S. 144, 187 (1992). But the Constitution calls for a different system: one in which the States are sovereigns, stewards of their navigable waters and other resources.

With the Revolution, the people of the thirteen original States assumed the sovereignty of the crown and with it, title to their navigable waters. When the federal government acquired additional lands, it held their waters in trust for the future States. The new States assumed sovereignty over them under the equal footing doctrine. Although there may be times when the central government has reason to abort a state's constitutional right to its navigable waters by making prestatehood reservations, these occasions are few and far between. This Court has provided a series of bright lines against which assertions that States' rights have been terminated are measured. Such grave actions, depriving States as they do of a portion of their sovereignty, are not to be inferred lightly. These standards are guided by the principle that Congress holds the navigable waters in trust for the future States. They are further guided by the constitutional doctrine that new States are admitted to the union on an equal footing with the original ones. Their sovereign rights should not be diminished by the happenstance that for a brief period they were territories, in which the United States exercised paramount control under the Property Clause.

The trust in which the federal government holds navigable waters for the future States necessarily must be

analyzed in terms of the trust obligations this Court has held apply to the States once they take title to them on statehood. The trust in which these waters are held prohibits abdication of control over them. They "cannot be placed entirely beyond the direction and control of the [future] State." *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 454 (1892). Control over them for purposes of the trust can only be relinquished for purposes of the trust. Parcels relinquished must be limited to those that can be disposed of without substantial impairment of public interest in the remaining lands and waters, and the intent to dispose of them must be made in the most clear and specific terms. There is necessarily a strong presumption that this trust was not violated by the acts of the federal government before statehood. A prestatehood withdrawal is not valid unless it is made by Congress for an appropriate public purpose, defined in terms of "international duty or public exigency." *Shively v. Bowlby*, 152 U.S. 1, 50 (1894). Furthermore, Congress must have shown expressly that it intended to withdraw the navigable water in question, and that it intended in so doing to defeat a State's equal footing interest.

The Ninth Circuit opinion below muddies these objective safeguards. It accepts as adequate to prove a valid prestatehood withdrawal 1) an ambiguous executive order, followed by 2) expressed Senatorial confusion, 3) a self-serving agency memorandum and 4) an agreement *not ratified by Congress until after statehood*. If this is to be the standard by which the defeat of equal footing rights is measured, States are placed potentially at risk of losing their most treasured waters to sudden and unheralded claims brought by the federal government

under this vague and uncertain rule. Any vestiges of the equal footing rule, and the trust obligation of the United States toward future States, is obliterated. The States' constitutionally-derived powers over these waters should not rest on such shifting sands.

ARGUMENT

I.

THE NAVIGABLE WATERS ARE HELD IN TRUST FOR FUTURE STATES.

A. Control Over Navigable Waters is an Attribute of State Sovereignty.

Many chapters of United States history are given over to the controversies between State and federal sovereigns over lands and waters. The retention by the federal government of large tracts of land – sometimes amounting to well over half the lands within a particular State – has inevitably given rise to tension and conflict when expansive federal interests have collided with States' efforts to regulate and administer resources acquired by virtue of their sovereignty. Sometimes the principles of federalism have been neglected in the process. This Court only recently counseled for consideration of the special concerns that arise when a federal policy "alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency v. Corps of Engineers*, No. 99-1178, Slip Opn. 12 (Jan. 9, 2001), 531 U.S.___ (2001). In the past few years, the Court has shown itself acutely cognizant of the need to recognize that States are more than mere subdivisions of the

federal government, and that the Constitution confers on them the power and responsibility to manage and safeguard their resources. E.g., *New York v. United States*, 505 U.S. 144 (1992).

No state power is more traditional than that exercised over its navigable waters, subject only to the federal navigable easement. This Court recognized in 1842 that "When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Martin v. Waddell*, 16 Pet. (41 U.S.) 367, 410 (1842), quoted in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 282 (1997). More recently admitted States entered the Union on an equal footing with the original States and their interest over these "sovereign lands" is identical. *Pollard v. Hagan*, 3 How. (44 U.S.) 212 (1845). As this Court has observed in an earlier phase of this very litigation, "The principle which underlies the equal footing doctrine and the strong presumption of State ownership is that navigable waters uniquely implicate sovereign interests." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997).

B. The Federal Government Holds Navigable Waters in Trust for the Future States.

This principle of sovereign waters, held in public trust, is rooted in ancient Roman and medieval law, and reflected in the Magna Carta. *Arnold v. Mundy*, 1 Halst. (6

N.J.L.) 1 (N.J. 1821).[1] These traditions were carried to the new world from the beginning. The Great Pond Ordinance of Massachusetts Bay Colony in 1641 guaranteed the right to fish and fowl in ponds greater than 10 acres in size, with freedom of access through private property for that purpose. Similar protections were afforded freshwater lakes in Maine and New Hampshire. See Locke, Right of Access to Great Ponds by the Colonial Ordinance, 12 ME L.REV. 148 (1918); *Hardin v. Jordan*, 140 U.S. 371, 393 (1891).

As this Court observed, "[T]he men who first formed the English settlements, could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another as private property; and the settlers upon the fast land thereby excluded from its enjoyment, and

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[1] The Institutes of Justinian restated Roman law as follows: "By the law of nature these things are common to mankind – the air, running water, the sea and consequently the shores of the sea." All rivers and ports were public, and the right of fishing was common to all men. The Institutes of Justinian 2.1.1 L (T. Cooper trans. & ed. 1841). This principle was restated in Las Sietes Partidas, the law of 13th century Spain. At about the same time, Bracton was restating the Roman rule in medieval England. There, the crown held ownership of the beds of navigable waters, but its interest was very different from that enjoyed by private landholders. The navigable waters in which public rights existed were inalienable. They could not be separated from the Crown. 2 H. Bracton, On the Laws and Customs of England 16-17, 39-40 (S. Thorne trans. 1968). See *Shively v. Bowlby*, 152 U.S. at 11-14.

unable to take a shell-fish from its bottom or fasten there a stake, or even bathe in its waters without becoming a trespasser upon the rights of another." *Martin v. Waddell*, 16 Pet. (41 U.S.) 367, 414 (1842). The enormous practical and historical significance of state sovereignty over navigable waters drives the scrutiny given assertions that Congress has defeated State interests in these waters by pre-statehood reservations. Necessarily, such assertions have been regarded with scepticism and subjected to strict, objective standards.

These waters are held "in trust for the future States to be ultimately created. . . . " *Shively v. Bowlby*, 152 U.S. at 52. This Court has stated time and again that a strong presumption exists against the inclusion of navigable waters within prestatehood reservations. They may be made only "in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce . . . or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." *United States v. Alaska*, 521 U.S. 1, 40 (1997), quoting *Utah Division of State Lands v. United States*, 482 U.S. 193, 196-197; *Shively v. Bowlby*, 152 U.S. at 48.

The States' title to their sovereign waters is "conferred not by Congress but by the Constitution itself." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. at 283, quoting *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977). Once the State assumes title to these waters, Congress is without power to reclaim them. *Pollard v. Hagan*, 3 How. (44 U.S.) 212, 230 (1845).

It is no light matter, then, to find that Congress intended to withhold from a newly admitted state an indispensable attribute of its sovereignty. Not only must such an action be for purposes appropriate to its responsibilities over the public lands, but there must be a showing that, before statehood, 1) Congress intended that the reservation include such waters, and 2) the United States intended to defeat the future State's title to them. *Utah Div. of State Lands, supra.* Nothing in the opinion below reflects a federal interest justifying such a drastic result as depriving the people of Idaho of "one of the Nation's most beautiful lakes," *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 264 (1997) in order to place it under the exclusive jurisdiction of another sovereign refusing to acknowledge public trust responsibilities, with the apparent effect of depriving the people generally of their trust-derived rights of access and recreation. See Amicus Curiae brief of Benewah County and Kootenai County, Appendices 1, 2. Furthermore, nothing in the record shows that Congress took action to defeat the State's title prior to statehood.

II.

IDAHO'S NAVIGABLE WATERS PASSED IRREVOCABLY TO THAT STATE ON ADMISSION TO THE UNION.

A. Lake Coeur D'Alene and its Tributaries Are Sovereign Waters of the State of Idaho.

The navigable waters of Idaho, like those of other States, belong to its people. They were acquired by that State by virtue of its sovereignty, under the Constitution,

rather than by act of Congress. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). The water body most affected by this case is Lake Coeur d'Alene, a body of water 25 miles long and two and a half miles wide. It was once called one of the five most beautiful lakes in the world by National Geographic Magazine. It hosts one of the largest populations of osprey in the nation. Bald eagles feast on its salmon in the winter. American Automobile Assn. Tour Book 33 (Feb. 1992).

Idaho has embraced the public trust doctrine, and its courts implement it. E.g., *Kootenai Environmental Alliance v. Panhandle Yacht Club*, 671 P.2d 1085 (Ida. 1983). The protection of fisheries and other wildlife within the State is part of its public trust interest in its navigable waters: "The State holds the propriety of its soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery." *Smith v. Maryland*, 59 U.S. (18 How.) 71, 75 (1955); see also, *Phillips Petroleum Co. v. Mississippi & Saga Pet.*, 484 U.S. 469, 476 (1988).

B. Neither the United States Nor the Tribe Acknowledges the Trust Responsibilities Administered by Idaho in its Navigable Waters.

Although, as this Court has observed, the Tribe for whose benefit the Lake is claimed may view the lands "just as necessary to its own dignity and ancient right," *Idaho*, 521 U.S. at 287, it is incontrovertible that neither the federal government nor the Tribe acknowledges public trust responsibilities. See C. Wilkinson, The Public Trust Doctrine in Public Land Law, 14 U.C. DAVIS L.REV.

269 (1980). Although logic compels the same trust should apply, the United States rejects any duty to take those trust responsibilities into consideration in the planning and allocation of resources for the Lake. Cf. *United Plainsmen v. North Dakota State Water Cons. Comm.*, 247 N.W.2d 457 (N.D. 1976); *National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983), cert. denied, 464 U.S. 977 (1983). It rejects the principle of inalienability, so forcefully set forth in *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). And it would potentially deny to the people of Idaho their right to use the waters of the Lake for recreation, boating, and ecological preservation. See Amicus Curiae Brief of Benewah and Kootenai Counties, App. 1-4. Cf. *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971).

C. The Trust in Which Navigable Waters Are Held for the People of the Future States Severely Restricts Their Alienation.

Because these waters are held in sovereign trust, they cannot be wholly alienated. As the New Jersey Supreme Court stated in *Arnold v. Mundy*: "The sovereign power itself (in navigable waters) . . . cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right." That would be a grievance, said New Jersey's Chief Justice, "which never could be long borne by a free people." *Arnold v. Mundy*, 6 N.J.L. 1, 78 (1821); see, also *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). A later state court expressed the principle as follows:

> The legislature has no more authority to emancipate itself from the obligation resting upon it which it assumed at the commencement of its statehood, to preserve for the benefit of all the people forever the enjoyment of the navigable waters within its boundaries, than it has to donate the school fund or the state capitol to a private purpose. It is supposed that this doctrine has been so firmly rooted in our jurisprudence as to be safe from any assault that can be made upon it. *Priewe v. Wisconsin State Land & Improvement Co.*, 79 N.W. 780, 781 (Wis. 1899).

When this Court held in *Shively* that the navigable waters were held "in trust for the several States to be ultimately created," *Shively v. Bowlby*, 152 U.S. at 57, it necessarily had in mind the attributes of the public trust in which navigable waters are held generally. Only two years before, in *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892) it had taken pains to define the limits on alienation imposed by the public trust on such lands. There, the Court held that the public's interest in Lake Michigan was such that the legislature lacked power to dispose of a major portion of its bed, consisting of the Chicago waterfront. While the legislature could make grants of parcels for trust-related purposes, and of parcels that do not substantially impair the public interest in the lands and waters remaining, the Court held, "[T]hat is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such water of the use of the public. The trust devolving upon the State for the public,

and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. *The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. . . . " Illinois Central,* 146 U.S. at 452-53 (emphasis added).

The Court laid down a two-part test for determining the validity of a legislative grant of navigable waters:

1. Does the disposition affirmatively aid or improve the public interest in navigation or other public use of the particular area of the waterway beneath the ordinary high watermark?

2. If the legislative grant does not affirmatively aid or improve the public trust, does the disposition substantially impair the public interest in the remaining lands and waters of the particular area of the waterway? *Ibid.*

Further, the Court held, title of the State cannot be surrendered or delegated for other than *public* purposes: "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of peace. . . . *So with trusts connected with public property, or*

property of a special character, like lands under navigable waters; they cannot be placed entirely beyond the direction and control of the State." Id. at 453-54 (emphasis added).

When the Court in *Shively* referred to the limitations applicable to grants or navigable waters by Congress before statehood, it must have been aware of the trust limitations it imposed on such lands two years earlier. Indeed, it restated the time-honored principle that "[T]he title and the control of them are vested in the sovereign for the benefit of the whole people." *Shively v. Bowlby,* 152 U.S. at 57. The references in that opinion to the right of Congress to make prestatehood grants "for appropriate purposes," measured by such standards as "international duty" and "public exigency," 152 U.S. at 58, must necessarily be measured against the overall trust obligations spelled out in *Illinois Central* as well. It would be anomalous indeed if this Court were to hold the United States, as trustee for the future states, to a lesser duty than the one to which it subjects the States themselves as trustees of their navigable waters. It is inconceivable that the United States, a trustee of these waters for the State-to-be, may alienate them for any "public purpose," when the sovereign State is held by this Court to a strict trust standard requiring them to preserve such waters for trust purposes and prohibiting the wholesale "abdication" of control over them. *Illinois Central Railroad,* 146 U.S. at 452-53.

Nevertheless, neither the Tribe nor the United States acknowledges trust inhibitions. One of the principal critics of the Crown's ownership of navigable waters attacked that concept on the ground that the King would only sell such lands to reduce the national debt. S. Moore,

History of the Foreshore xlviii (1888). Is it beyond conception that in the absence of public trust protection, the bed of this remarkable body of water could at some future time be filled and used for commercial development or other purposes inconsistent with the people's ancient rights?

All these considerations underline the gravity of asserting that Congress, acting under the Property Clause, could and intentionally did prevent the operation of the equal footing doctrine and deprive the people of the State of a national treasure.

III.

ONLY UNDER THE MOST UNUSUAL CIRCUMSTANCES SHOULD A STATE'S SOVEREIGN WATERS BE DEEMED TO HAVE BEEN RESERVED PRIOR TO STATEHOOD.

A. Principles of Federalism Demand a Narrow Standard and a High Hurdle for Prestatehood Withdrawals.

This Court has recently observed that significant constitutional and federalism questions arise when expansive readings are given to the exercise of federal power which significantly impinges on the State's "traditional and primary power over land and water use." "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971); *Solid Waste Agency, supra*, Slip Opinion at 13. This Court has declined in past cases to find that Congress intended to foreclose a State's equal footing rights. "Only in the most unusual

circumstances" has Congress withheld navigable waters from States. *Utah Div. of State Lands v. United States*, 482 U.S. at 197. Such prestatehood withdrawals were "not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).[2] When the Court found a prestatehood withdrawal, it made it clear that the case was highly unusual. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), and "based on very peculiar circumstances," *Montana v. United States*, 450 U.S. 544, 555 U.S. (1981).

More representative of the consistent precedent is *Montana v. United States*, 450 U.S 544 (1981), in which the State's interest in the bed of the Big Horn River, flowing through the Crow Tribe Reservation, was held not to be conveyed to the Tribe. As in this case, the applicable treaty did not refer expressly to the riverbed; nor was any intent to convey the bed set forth in "clear and especial

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[2] This principle is further elucidated by Congress in section 3 of the Submerged Lands Act, 43 U.S.C. sec. 11311(a), declaring it to be in the "public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop and use the said lands and natural resources, all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States. . . . " The only applicable exceptions from this provision in the Act refer to "all lands *expressly retained* by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea)." Sec. 5(a), 43 U.S.C. sec. 1313(a) (emphasis added). See *United States v. Alaska*, 521 U.S. at 63-64 (Thomas, J. dissenting).

words." 450 U.S. at 554, quoting *Martin v. Waddell*, 16 Pet. at 417.

No "clear and especial words" appear in the record here to support the drastic result reached below. Although a portion of Lake Coeur d'Alene was included within the executive reservation, nothing in the order indicated that the President intended to abrogate the trust in which navigable waters are held for future States.

B. Congress Must Act Expressly Before Statehood to Defeat the State's Claims.

Although in 1888 the Senate expressed confusion over the boundaries of the reservation, and authorized the Interior Secretary to negotiate for purchases of portions of the reservation "valuable chiefly for minerals and timber," the subsequent agreement was never accepted by Congress until *after* Idaho's statehood. *United States v. Idaho*, 210 F.3d 1062 (9th Cir. 2000). Once a State is admitted into the Union, of course, its title to navigable lakes and rivers vests and is non-revocable. *Pollard*, 3 How. at 230. Congress must act before statehood to defeat the future States' claim. *Utah*, 482 U.S. at 202.

C. The Purported Withdrawal of Lake Coeur D'Alene Before Idaho's Admission Did Not Meet the Requisite Standards.

Under accepted federalism holdings, the power of the federal government under the property clause to withhold navigable waters from a state can only be exercised in order "to perform international obligations, or to

effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." *Shively v. Bowlby,* 152 U.S. 1, 48 (1894). This language must be read within the context of "international duty or public exigency." *Id.* at 58. Otherwise it could hardly stand muster in light of the fundamental principles of federalism involved. Such a purpose may necessarily exist when reservation of lands for petroleum requires retention of submerged beds as well as uplands. *United States v. Alaska,* 521 U.S. 1 (1992). Or a treaty obligation may obligate the United States to reserve a riverbed when it has promised the reservation will never be included within a state. *Choctaw National v. Oklahoma,* 397 U.S. 620 (1970).

In this case, however, it is hard to see how withdrawing one of the nation's major lakes from a State's sovereign trust lands carries out any legitimate public purpose. There is no showing in the record that Idaho's trust obligations for Lake Coeur d'Alene would permit it to exclude the Tribe from its waters, or to prevent tribal members from fishing and hunting pursuant to reasonable regulation.

D. Equal Footing Principles Call for a Narrow Construction of Federal Power to Defeat State Sovereign Title.

This is a case in which the strength of the federal interest must be evaluated "in light of the degree to

which such laws would prevent the State from functioning as a sovereign." *New York v. United States*, 505 U.S. at 163. The Constitution does not authorize Congress to require States to govern according to its instructions. *Id.* at 161. Yet the withdrawal of navigable waters seriously diminishes State sovereignty and substantially curtails the exercise of State powers. *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926). Such considerations apply to States-to-be just as they do to existing ones. Certainly the withdrawal of a major part of one of the nation's most beautiful lakes diminishes Idaho's sovereignty. It is a violation of the principle that "[N]either government may destroy the other; nor curtail in any substantial manner the exercise of its power." *Id.* The principle under which newly admitted States accede to their navigable waterways is the equal footing doctrine, a constitutional doctrine enunciated by this Court in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*

Since the Revolution made the people sovereign, and therefore entitled to their navigable waters and the soil under them, the Constitution demands that States later admitted to the Union have the same perquisites of sovereignty. But the new States do not receive equal footing, if their sovereignty is subject to the whim of Congress and their waters, unlike those of the 13 original States, are subject to prestatehood withdrawals. The only difference between the new States and the old is the unfortunate happenstance that the new ones existed for brief periods as territories of the United States, in which Congress exercised the Property Clause over lands in its possession and control. Earlier decisions of this Court properly stated without qualifications that these lands were held

in trust for the future State. Future decisions of this Court should hold the federal government to a strict standard in light of that trust obligation, and the right of the States to equal footing in the Union.

CONCLUSION

The bed of Lake Coeur d'Alene and its related rivers was held by the United States in trust for the future State of Idaho. The public trust in which that lake is held for the people is as applicable to the federal government as trustee as it is to the State. If "the great right of domain and ownership" in these waters was to have been withheld from the people of the State and their ancient rights of "common fishery" withdrawn, "that design . . . would have been clearly indicated by appropriate terms and would not have been left for inference from ambiguous language." *Martin v. Waddell*, 16 Pet. at 416.

As the Court stated in 1869:

> "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of its constitution as the preservation of the union and the maintenance of the national government. The Constitution, with all its processes, looks to an indestructible union, composed of indestructible states." *Texas v. White*, 7 Wall (74 U.S.) 700, 725 (1869).

The Property Clause, like the Supremacy Clause, "gives the federal government a decided advantage in th(e) delicate balance the constitution strikes between

state and federal power." *Gregory v. Ashcroft*, 510 U.S. 460 (1991). This is not a case in which that advantage can or should be taken. The State of Idaho, under the public trust doctrine, acts as constitutional steward for Lake Coeur d'Alene. That lake's priceless resources are held for all the people of the State, as well as the tribes of Idaho. There is room in our federal system for States, tribes, and the national government. When the constitutional function of States as sovereigns can be reconciled with the federal stewardship of native peoples, there is no reason to strain for results that will only put further strains on our federal scheme.

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